# WISCONSIN SUPREME COURT
# CALENDAR AND CASE SYNOPSES
# JANUARY 2020

The cases listed below will be heard by the in the Supreme Court Hearing Room, 231 East, State Capitol. The cases originated in the following counties:

Barron
Fond du Lac
Milwaukee
Waukesha
Winnebago

**MONDAY, JANUARY 13, 2020**

| | | |
|---|---|---|
| 9:45 a.m. | 17AP2132 | Timothy W. Miller v. Angela L. Carroll |
| 10:45 a.m. | 18AP1781-D | Office of Lawyer Regulation v. Robert B. Moodie |
| 1:30 p.m. | 17AP1616 | London Scott Barney v. Julie Mickelson, M.D. |

**WEDNESDAY, JANUARY 15, 2020**

| | | |
|---|---|---|
| 9:45 a.m. | 16AP1982 | Winnebago County v. C. S. |
| 10:45 a.m. | 17AP2440-CR | State v. Richard H. Harrison, Jr. |
| | 17AP2441-CR | State v. Richard H. Harrison, Jr. |

**TUESDAY, JANUARY 21, 2020**

| | | |
|---|---|---|
| 9:45 a.m. | 18AP1209-CR | State v. Mose B. Coffee |
| 10:45 a.m. | 18AP1165 | Jose M. Correa v. Woodman' s Food Market |
| 1:30 p.m. | 17AP774-CR | State v. Courtney C. Brown |

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

17AP666-D Office of Lawyer Regulation v. Terry L. Constant

***Note:*** The Supreme Court calendar may change between the time you receive these synopses and when a cases is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Stephanie Fryer at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

**WISCONSIN SUPREME COURT**
**January 13, 2020**
**9:45 a.m.**

2017AP2132 Timothy W. Miller v. Angela L. Carroll

*This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that reversed the decision of the Barron County Circuit Court, Judge J. Michael Bitney presiding, and remanded the case for proceedings before a different circuit court judge.*

This case takes up the questions of under what circumstances a judge's social media connection with a litigant may constitute disqualifying objective bias and under what circumstances social media communications may constitute ex parte communications.

The facts of this case are as follows. Timothy Miller and Angela Carroll have a minor son together. In 2011, they stipulated that they would share joint legal custody and physical placement of their son. In 2016, Carroll filed a motion to modify the stipulated order, seeking sole legal custody and primary physical placement, as well as child support payments from Miller. At the conclusion of an evidentiary hearing on Carroll's motion, Barron County Circuit Court Judge J. Michael Bitney took the motion under advisement and ordered the parties to file written arguments within 10 days. The parties filed their written arguments on June 16, 2017, in accord with the court's order.

Three days after the parties filed their written arguments, Judge Bitney accepted a Facebook friend request from Carroll. This Facebook friendship was not disclosed to Miller or his counsel.

On July 14th, Judge Bitney issued a written decision granting Carroll's motion with respect to the legal custody and physical placement of Carroll and Miller's son. In the decision, Judge Bitney found that Miller had engaged in a pattern of domestic abuse against Carroll, which warranted a modification of custody and placement. Based on his decision, Judge Bitney entered a written order dated August 1, 2017 to implement his rulings. He did not include a ruling on child support at that time, directing the parties to submit updated financial disclosures within 30 days. He said that he would then render a decision on the child support issue.

Between Judge Bitney accepting Carroll's friend request on June 19th and issuing his order on Aug. 1, Carroll "liked" 18 of Judge Bitney's posts and commented on two of his posts. None of the "likes" or the comments related to the litigation. On the other side, Judge Bitney did not "like" or comment on any of Carroll's posts, nor did he reply to any of Carroll's comments on his posts. He did not, however, deny having read Carroll's posts. During that same period of time, Carroll also liked multiple third-party posts and shared one third-party photograph that were related to domestic violence. It is undisputed that Caroll's activities could have appeared on Judge Bitney's Facebook "newsfeed."

On Aug. 1, the day when the circuit court issued its written order, the guardian ad litem (GAL) for the son was made aware of a Facebook post authored by Carroll regarding the court's order. While searching for the post, the GAL discovered that Carroll and Judge Bitney were Facebook friends. The GAL reported the Facebook connection to Miller's counsel, who in turn informed Miller.

Miller moved the circuit court for reconsideration of the order and for relief under Wis. Stat. § 806.07. In the motion, Miller also argued that Judge Bitney must recuse himself because

the Facebook connection with Carroll while the case was pending gave rise to an appearance of partiality.

Judge Bitney acknowledged accepting Carroll's friend request between the date of the hearing and rendering a decision on Carroll's motion. He concluded, however, that he was not subjectively biased because by the time he accepted the friend request, he had already decided how he would rule on the motion, although he acknowledged that he had not committed his thoughts to writing. He also determined that the circumstances of his Facebook connection to Carroll did not "rise[] to the level of objective bias . . . ." Accordingly, he denied Miller's motion.

The Court of Appeals reversed and remanded. It determined that Judge Bitney's conduct in accepting Carroll's friend request and their subsequent social media interactions without disclosing those things to Miller had created an appearance of impropriety that constituted objective bias.

Carroll petitioned the Supreme Court for review. The issues raised for review are:

1. In this matter of first impression, without any allegation of subjective bias, without any allegation that objective facts existed that Judge Bitney treated Timothy W. Miller unfairly, and when there were no electronic social media ("ESM") communications between Ms. Carroll and Judge Bitney regarding the merits of the underlying case, does being a "friend" on Facebook alone overcome the presumption that judges are fair, impartial, and capable of ignoring any biasing influences thereby constituting a due process violation and a bright-line rule prohibiting the judicial use of ESM?
2. In this matter of first impression, does "liking" a Facebook post unrelated to the pending litigation or commenting on a Facebook post unrelated to the pending litigation constitute an ex parte communication between a party and a judge?

**WISCONSIN SUPREME COURT**
**January 13, 2020**
**10:45 a.m.**

2018AP1781-D Office of Lawyer Regulation v. Robert B. Moodie

The only issue on appeal in this lawyer discipline case is whether the referee's recommended discipline of a six-month suspension of Attorney Robert B. Moodie's law license is appropriate.

Some background: Moodie was admitted to the Wisconsin Bar in 1982. He practiced at the same firm in Waukesha for over 30 years. He has no disciplinary history. In September 2016, Moodie suffered a serious heart attack resulting in a lengthy hospitalization. During Moodie's absence, other members of the firm assumed responsibility for his client files, including the management of his billing. While handling Moodie's files and billing, the firm discovered that in five separate client matters, over a period of 18 months, Moodie had converted at least $8,665 in client fees to his personal use, rather than paying them into the firm's account.

Moodie concedes that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and that he breached his fiduciary duty to his firm and his duty of honesty in his professional dealings with the firm.

After holding a one-day sanctions hearing, the referee issued the report now before the court. Instead of the referee's recommended six-month suspension, Moodie asks that the court impose a 60-day suspension.

**WISCONSIN SUPREME COURT**
**January 13, 2019**
**1:30 p.m.**

2017AP11616 Barney v. Wis. Dept. of Health and Family Services

*This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that reversed the judgment of the Milwaukee County Circuit Court, Judge Timothy M. Witkowiak presiding, based on a jury verdict, that dismissed the complaint filed by plaintiffs, London Scott Barney and Raquel Barney.*

This appeal involves a dispute over the circumstances in which a trial court presiding over a medical malpractice trial should give a jury instruction known as the "alternative methods instruction." That instruction, codified as Wis. JI-Civil 1023, states as follows:

> *If you find from the evidence that one method of (treatment for)(diagnosing) (plaintiff)'s (injuries)(condition) was recognized as reasonable given the state of medical knowledge at that time, then (doctor) was at liberty to select any of the recognized methods. (Doctor) was not negligent because (he)(she) chose to use one of these recognized (treatment)(diagnostic) methods rather than another recognized method if (he)(she) used reasonable care, skill, and judgment in administering the method.*

The facts underlying this medical malpractice action are as follows. On the evening of February 15, 2012, Raquel Barney[1] was admitted to Columbia St. Mary's Hospital in Milwaukee (Columbia St. Mary's) for the purpose of inducing labor. Raquel was ultimately in labor for more than 24 hours, delivering her son London at 9:27 p.m. on February 16, 2012. The doctor ultimately responsible for Raquel's labor and delivery was Dr. Mickelson.

During the labor Dr. Mickelson and hospital staff used an external fetal monitor strapped to Raquel's abdomen to observe (on a monitor) and to record (on a tracing strip) London's heart tones. In addition, the fetal monitor broadcasts the sound of the heart tones. The heart tones of a baby in utero are different from those of the mother. By monitoring the heart tones and reviewing the tracing strip, doctors and nurses can usually assess fetal well-being by evaluating snapshots of and the pattern of the baby's heart rate. This information allows an assessment of the oxygenation and acid-base status of the baby's blood.

The dispute in this case relates primarily to the last 90 minutes of Raquel's labor, when she was in the pushing stage. The Barneys contend that during this period, the external monitor ceased reporting the baby's heart rate and instead was reporting the mother's heart rate. According to them, the consequence of this switch, which Dr. Mickelson and the hospital staff did not catch, was that the providers failed to see signs of oxygen deprivation in London.

When London was delivered, he was nonresponsive, his skin tone was blue, and he had limited muscle movements. A neonatologist was able to resuscitate him, but he ultimately sustained permanent injuries.

[1] Because the facts involve both mother and son, this summary will use their first names. When referring to the mother and son as co-plaintiffs, this summary will refer to them collectively as "the Barneys" or "the plaintiffs."

The Barneys filed a medical malpractice action against Dr. Mickelson and Columbia St. Mary's.[2]

Both sides presented expert testimony at trial regarding whether Dr. Mickelson and the hospital staff had followed the appropriate standard of medical care. The Barneys' expert witness, Dr. Bruce Bryan, opined that in the hours prior to London's birth, the fetal monitoring strips showed multiple discontinuous readings, which suggested that the strips were not continuously and accurately measuring London's heart rate in utero. He further asserted that there had been multiple instances on February 16th when the external monitor had been recording Raquel's heart tones rather than London's heart tones and that certain portions of the monitoring strips indicated that London had been in distress. He opined that Dr. Mickelson had breached the standard of care by failing to employ an accurate method of London's heart rate when there were signs that London was in distress and by failing to obtain an accurate fetal heart tone reading during the 90-minute pushing stage of Raquel's labor. He testified that Dr. Mickelson could have ensured that she was getting London's heart tones by either placing an electrode on London's scalp while still in utero or placing a pulse oximeter on Raquel to compare her heart rate with the heart rate being recorded on the external fetal monitor.

Dr. Mickelson testified that discontinuity in the recording on the monitoring strips was not uncommon and can occur when the mother is repositioning or pushing. While there were times when she could not obtain a good fetal tracing during Raquel's labor, Dr. Mickelson testified that those periods were few and small in length and that she was confident that the majority of the monitor tracings showed the baby's heartbeat. She also explained that she had not inserted a fetal scalp electrode during the labor because Raquel had an infection and she did not want to risk injecting the mother's infected fluid into London's head.

The expert witnesses called by the defense disagreed with Dr. Bryan's opinions and concluded that Dr. Mickelson had been within the standard of care at all times by using the external fetal monitor during Raquel's labor. One of the defense experts specifically testified that the use of the external monitor was a recognized alternative method for monitoring the fetus during the labor. He also testified that the external monitor was tracing London's heartbeat for most of the labor, and that the tracings showed that London had not been in trouble.

At the jury instruction conference at the end of the trial, the parties disputed whether the alternative methods instruction should be given. The circuit court ruled that the instruction would be included in the instructions read to the jury. At the conclusion of its deliberations, the jury found Dr. Mickelson and Columbia St. Mary's had not been negligent in their care and treatment of both Raquel and London.

The Barneys appealed. The Court of Appeals reversed the judgment of dismissal and remanded the case to the circuit court for a new trial without the alternative methods instruction. Quoting one of its earlier decisions, the Court of Appeals stated that the instruction is optional and should be given only when the evidence allows the jury to find that "more than one method of diagnosis or treatment of the patient is recognized by the average practitioner." Finley v. Culligan, 201 Wis. 2d 611, 621-22, 548 N.W.2d 854 (Ct. App. 1996). Analogizing to another prior decision, Miller v. Kim, 194 Wis. 2d 187, 528 N.W.2d 72 (Ct. App. 1995), the Court of Appeals agreed with the Barneys' argument that because the use of the external fetal monitor, by itself, could not definitively demonstrate that it was tracing the fetal heartbeat at all times, Dr.

[2] They also named the Wisconsin Injured Patients and Families Compensation Fund (the Fund) as a defendant.

Mickelson's continued reliance on that method of monitoring was not an acceptable alternative diagnostic technique, but was the equivalent of doing nothing.

Dr. Mickelson and Columbia St. Mary's filed a petition for review, and the Fund filed its own separate petition. Dr. Mickelson and Columbia St. Mary's frame the issues to be reviewed as follows:

1. Should Miller v. Kim be reversed by this Court in order to permit a jury to consider alternative methods of treatment or diagnosis standard of care evidence at trial?
2. Should this Court clarify and resolve the different interpretations of the alternative methods paragraph between different court of appeals panels?
3. Should this Court clarify the application of the alternative methods paragraph in Wis. JI-Civil 1023?

The Fund frames the issues to be reviewed as follows:

1. Where multiple experts testified at trial that there were several recognized methods of monitoring fetal heart tones during labor, one of which is the use of an external fetal heart monitor, was the optional "alternative methods" jury instruction under Wis. JI-Civil 1023 properly given by the trial court?
2. Does Miller v. Kim, 191 Wis. 2d 187, 528 N.W.2d 72 (Ct. App. 1995), supply the proper rule for analysis where there was expert testimony at trial that there were several accepted alternative methods of assessing fetal heart tones during labor, one of which was external fetal monitoring?
3. Does the ruling from Miller v. Kim, where all experts agreed on the only diagnostic method to rule out meningitis, apply to electronic fetal monitoring of a fetus in labor, where despite its widespread use in labor, experts acknowledge that the efficacy of electronic fetal monitoring is controversial as a diagnostic tool to prevent brain damage and cerebral palsy from occurring during labor and delivery?

**WISCONSIN SUPREME COURT**
**January 15, 2020**
**9:45 a.m.**

2016AP1982 Winnebago County v. C.S.

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a decision of the Winnebago County Circuit Court, Judge Barbara H. Key, presiding, entering a decision extending C.S.' involuntary commitment and imposing involuntary medication and treatment.*

This case involves a challenge to the statute governing when an individual who is incarcerated may be medicated involuntarily. Wis. Stat. § 51.61(1)(g). As background, C.S. was convicted in 2005 of mayhem, as a repeater, and was sentenced to 20 years in prison. Seven years later, C.S., who has been diagnosed with schizophrenia, was involuntarily committed and transferred to the Wisconsin Resource Center ("WRC") in Winnebago County. In May 2015, Winnebago County filed a petition to extend C.S.'s commitment and to continue his involuntary medication. The letter submitted in support of the petition did not specifically opine that C.S. was dangerous. A jury determined that C.S. was mentally ill and made other relevant findings. The circuit court determined that the statutory requirements were met, and extended C.S.'s commitment and the order for involuntary medication and treatment.

Shortly thereafter, C.S. was released from prison on extended supervision which ended the involuntary commitment and medication orders. Post-release, C.S. filed a motion asserting that Wis. Stat. § 51.61(l)(g) is unconstitutional on its face and as applied to all prisoners committed under Wis. Stat. § 5l.20(1)(ar)[3] because it does not require a finding of dangerousness.

Wisconsin law does not require a finding of dangerousness to involuntary commit or involuntarily medicate a prisoner. See also Wis. Stat. § 51.20(1)(ar). This is different than the standard that is applied to a person who is not in prison; that scenario requires a finding of dangerousness. See, e.g., Wis. Stat. § 51.20(1)(a). C.S. contends that there is no rational basis for involuntarily medicating an individual in prison absent a finding of dangerousness. C.S. asserts that because Wis. Stat. § 51.61(1)(g) does not require a finding of dangerousness to involuntarily medicate a person who is incarcerated, the statute is unconstitutional.

The circuit court deemed the issue moot, but acknowledged that this issue will recur, so the court considered the merits of the argument and upheld the statute. The Court of Appeals affirmed, concluding that there is a legitimate reason for the state to medicate/treat even when there is no finding of dangerousness, namely, its responsibility for the general welfare of the prisoner. The court was satisfied that the Legislature has provided sufficient additional

[3] Wis. Stat. s. 51.20(1)(ar) requires that: (1) the individual is an inmate of the Wisconsin state prison system; (2) the inmate is mentally ill; (3) the inmate is a proper subject for treatment and is in need of treatment; (4) appropriate less restrictive forms of treatment were attempted with the inmate, and they were unsuccessful; (5) the inmate was fully informed about his treatment needs, the mental health services available, and his rights; and (6) the inmate had an opportunity to discuss his treatment needs, the services available, and his rights with a psychologist or a licensed physician.

procedural protections to a prisoner. The Court of Appeals thus ruled that, "Section 51.61(1)(g) is constitutional as it is reasonably related to the state's interest in caring for, treating, and assisting prisoners who suffer from mental illness where a court determines . . . that a prisoner is not competent to refuse medication. A finding of dangerous is not required prior to involuntarily medicating a prisoner who is found not competent to refuse medication under the law."

C.S. disagrees. He points to language in several other courts' decisions that suggest that a finding of dangerousness is necessary to pass constitutional muster. In Washington v. Harper, 494 U.S. 210 (1990), the U.S. Supreme Court considered what factual circumstances must exist before the state may administer antipsychotic drugs to a prisoner against his will. The Court held that a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." Id. at 221-22. The Court recognized that a prison includes individuals with a proclivity for antisocial conduct, and prison safety and security are legitimate state interests. Id. at 225, 223. The Court then concluded that the particular prison regulation before it was "a rational means of furthering the State's legitimate objectives," and stated: "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, *if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest*." Id. at 226-27 (emphasis added). C.S. reasons that if an individual in prison is not dangerous, then no threat exists to the safety and security of the institution. As such, C.S. maintains that Wis. Stat. § 51.61(1)(g) is not reasonably related to the state's interest in safety and security within institutions.

The County disagrees with C.S. and maintains that the statute is constitutional. The County notes that this Court has acknowledged that the admittedly significant liberty interest in refusing the administration of antipsychotic drugs is nonetheless "tempered by other interests, including . . . medical needs and the legitimate needs of the institution in maintaining security and safety within its prisons." Wood, 323 Wis. 2d 321, ¶20. The County emphasizes that application of Wis. Stat. § 51.61(1)(g) can be utilized only after there is a commitment pursuant to the explicit and numerous requirements of Wis. Stat. § 51.20(1)(ar), and that it pertains only to prisoners.

C.S. also suggests that the court may want to revisit the current "rational basis" standard of review, whereby a law will be upheld "unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." C.S. I, 366 Wis. 2d 1, ¶36 (internal citation omitted). He suggests that perhaps the court should follow U.S. Supreme Court precedent and require only a "plain showing" or a "clear demonstration" that a statute is unconstitutional. See United States v. Morrison, 529 U.S. 598, 607 (2000); National Federation of Independent Business et al. v. Sebelius, 567 U.S. 519, 538 (2000). The County responds that, with respect to the involuntary administration of antipsychotic medication, the U.S. Supreme Court specifically declined to adopt a standard of strict scrutiny. Riggins v. Nevada, 504 U.S. 127, 136, (1992). The County counsels against adopting an entirely new standard for judicial review of constitutional challenges.

The Supreme Court is expected to address the following issue:

Does Wis. Stat. § 51.61(1)(g) violate substantive due process because it does not require a finding of dangerousness to involuntarily medicate a prisoner?

**WISCONSIN SUPREME COURT**
**January 15, 2019**
**10:45 a.m.**

No. 2017AP2440-41 State v. Harrison

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed the order of the Clark County Circuit Court, Judge Nicholas J. Brazeau, Jr. presiding, which granted sentence credit to defendant Richard H. Harrison, Jr., and remanded the case back to the circuit court with directions to order the Department of Corrections to advance the start of the extended supervision portions of two sentences imposed on Harrison.*

This appeal addresses the issue of what occurs when incarceration time is initially credited to a sentence that is later invalidated and when there are other valid sentences to which the incarceration time could be credited, but the defendant is later convicted and resentenced in the initial criminal case.

The dispute in this criminal appeal relates to four separate convictions and sentences, two of which were later vacated. (There was a subsequent conviction and a new sentence in one of those two, as explained below.) The four underlying criminal cases are as follows: (1) Clark County Case No. 2007CF115 (the "2007 Case"); (2) Clark County Case No. 2008CF129 (the "2008 Case"); (3) Clark County Case No. 2010CF88 (the "2010 Case"); and (4) Ashland County Case No. 2011CF82 (the 2011 Case). The following timeline sets forth the relevant facts:

- March 2009: Harrison pleads no contest to theft charge in 2007 Case and to fraud charge in 2008 Case; circuit court withheld sentence and placed Harrison on probation in both;
- July 2011: Harrison found guilty of three charges in 2010 Case;
- Summer/fall 2011: Harrison's probation in 2007 and 2008 cases is revoked;
- December 2011: Circuit court sentenced Harrison after revocation of probation in both the 2007 and 2008 Cases; court imposed 3 years initial confinement (IC) and 3 years of extended supervision (ES) in each case (2007 Case and 2008 Case); sentences to run concurrently; 462 days of sentence credit awarded for 2007 Case and 119 days for 2008 case (so IC on 2007 Case should have been completed in September of 2013, and IC on 2008 Case should have been completed in August 2014, according to defense counsel);
- January 2012: Circuit court sentenced Harrison to a total of 13 years of IC and 7 years of ES in 2010 Case (sentences consecutive to each other and to any other sentence);
- October 2012: Harrison found guilty of charge of repeated sexual assault in 2011 Case;
- March 2013: Circuit court sentenced Harrison to 30 years IC and 10 years ES in 2011 Case;
- January 2015: Wis. Supreme Court affirmed order reversing conviction in 2010 case;
- June 2015: 2010 Case dismissed on prosecutor's motion after state decides not to retry it;
- January 2017: U.S. District Court (Western Wis.) vacates conviction in 2011 Case;
- January 2019: Harrison pleads guilty to amended charge of causing mental harm to a child in 2011 Case;
- August 2019: Ashland County circuit court sentenced Harrison on new conviction in 2011 Case to 6 years IC and 2 years ES

What is in dispute is the period of time between Harrison completing the IC portion of the 2008 case in August 2014 and the time when the 2011 conviction and sentence were vacated.

In August 2017, after the convictions had been vacated in the 2010 and 2011 cases, Harrison filed a motion for "sentence credit" against the remaining ES time in the 2007 and 2008 cases for the prison time he has served under the sentences in the subsequently vacated 2010 and 2011 Cases, pursuant to Wis. Stat. § 973.155. The state opposed Harrison's motion, arguing that the prison time he has spent after the expiration of the IC time in the 2007 and 2008 cases was not "in connection with" the sentences in those cases and therefore Harrison could not receive credit against the remaining ES time in those cases. The Clark County circuit court agreed with Harrison and granted his motion for sentence credit in the 2007 and 2008 cases. It concluded that since the sentences in the 2010 and 2011 cases had been vacated, the service of the ES portion of the 2007 and 2008 cases should date back to the completion of the IC time in those cases and Harrison should receive sentence credit against the ES portions of the 2007 and 2008 cases, which were the only remaining valid portions of any sentence at that point in time. The result of granting this sentence credit would have been a conclusion that the full sentences in the 2007 and 2008 cases had been completed.

The circuit court agreed with the result reached by the circuit court (that Harrison should receive some benefit for the time he had served in prison under the subsequently vacated sentences in the 2010 and 2011 Cases), although it relied on a different rationale. It disagreed that "sentence credit" could be awarded for the prison time at issue under the terms of the sentence credit statute, Wis. Stat. § 973.155(1)(a), because the prison time at issue had not been served "in connection with" the 2007 and 2008 cases. Rather, that prison time had been served "in connection with" the 2010 and 2011 cases, although the sentences in those cases had later been vacated. The court of appeals reasoned, however, that because the sentences in the 2010 and 2011 cases were later vacated, they lacked force or effect so the defendant and the state needed to be placed back into the positions they occupied prior to those sentences. This meant that the ES portions of the 2007 and 2008 cases had to be advanced back to the date when Harrison had completed the IC portion of those sentences (and had begun to serve the IC portions of the 2010 and 2011 cases). In other words, according to the court of appeals, this was not a matter of awarding sentence credit but of advancing the remaining parts of the valid sentences to commence at the proper time in light of the nullification of earlier sentences.

After the Supreme Court granted review, Harrison received his new sentence in the 2011 case following his guilty plea to the amended charge. He now argued that he should no longer receive sentence credit against the ES portions of the 2007 and 2008 cases, nor should the ES portions of those sentences be advanced. Instead, he argued that, in light of his new sentence in the 2011 case, he should receive sentence credit against the IS portion of the new 2011 Case sentence under Wis. Stat. § 973.04, which is entitled "Credit for imprisonment under earlier sentence for the same crime," and which provides that "[w]hen a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department [of corrections] shall credit the defendant with confinement previously served." Harrison therefore moved the Supreme Court to summarily reverse the Court of Appeals decision that had applied the prison time at issue to the ES portions of the 2007 and 2008 cases.

The Supreme Court denied Harrison's motion for summary reversal and directed the parties to proceed with submitting their written briefs.

The State's initial petition for review asked the Supreme Court to decide the following issue in light of the Court of Appeals' decision: "Did the Court of Appeals err when it ignored [Wis. Stat. § 973.04] to effectively award Harrison sentence credit?"

When the Supreme Court denied Harrison's subsequent motion for summary reversal, it directed the parties to address the following two additional issues:

1. Whether this court may or should summarily reverse or vacate a court of appeals' decision due to a change in position by one party or due to the fact that both parties now appear to have a similar position as to a legal issue addressed in the court of appeals' decision; and
2. Whether the defendant-respondent is judicially estopped from now taking the position that the court of appeals' decision should be reversed and the cases should be remanded to the circuit court with directions to deny his motion for sentence credit, including whether the fact of the intervening sentencing in Ashland County Case No. 2011CF82 renders the doctrine of judicial estoppel inapplicable.

**WISCONSIN SUPREME COURT**
**January 21, 2020**
**9:45 a.m.**

2018AP1209-CR State v. Mose B. Coffee

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a decision of the Winnebago County Circuit Court, Judge John A. Jorgensen, presiding, denying Coffee's suppression motion and convicting him of operating a motor vehicle while intoxicated (OWI), second offense, and possession of THC with intent to deliver.*

This case involves the permissible scope of a warrantless search when an individual is arrested on suspicion of driving while intoxicated. Warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions. State v. Sanders, 2008 WI 85, ¶27, 311 Wis. 2d 257, 752 N.W.2d 713. One such exception is the search of a vehicle incident to arrest, "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." Arizona v. Gant, 556 U.S. 332, 335 (2009). This case raises the question: What is the permissible scope of that search in an OWI case?

Police stopped Mose Coffee's vehicle because it had no front license plate. During the stop, the officer noted that the driver, Coffee, appeared drunk. Coffee was arrested for Operating While Intoxicated (OWI) and secured in the back of a squad car. An officer then searched Coffee's vehicle. Specifically, the officer rummaged around in a tote bag that had been placed in the vehicle's back seat, behind the driver's seat. In the tote bag, underneath a number of other items, the officer found some jars containing marijuana. After this discovery, another officer searched the trunk of the car, where he found almost one kilogram of marijuana. Coffee was charged with possession with intent to deliver THC; possession of drug paraphernalia; second offense operating a motor vehicle while intoxicated; and second offense operating with a prohibited alcohol concentration.

Coffee moved to suppress all of the drug evidence. He maintains that the search of his vehicle incident to his alcohol-related OWI arrest did not automatically permit the search of the tote bag behind the driver's seat; he says it was not reasonable for officers to believe that evidence of the alcohol-related OWI arrest would be found inside the bottom of a bag behind the driver's seat.

The circuit court conducted a hearing and found that the bag was within "arm's reach, right behind the driver's seat," and that, based on this location, Coffee "could clearly put his hand behind him and place an object in that bag." The court thus denied the suppression motion. Coffee entered a guilty plea to a charge of OWI, second offense, and possession of THC with intent to deliver.

On appeal, Coffee renewed his challenge to the scope of the search. He cited State v. Hinderman, No. 2014AP1787-CR, unpublished slip op., ¶¶4, 10-11 (Wis. Ct. App Feb. 12, 2015), where the Court of Appeals affirmed an order *suppressing* evidence found during a search incident to an OWI arrest. In that case, drug-related items were found in a small pouch in the vehicle. The Hinderman court concluded that evidence of alcohol consumption was not likely to be found in a pouch that size because it "wouldn't hold a half pint of alcohol, it wouldn't hold a can of beer, it wouldn't hold the flask[-]type things that can be used to carry alcohol." Id., ¶10.

The Hinderman court rejected the State's claim that the search was lawful because a small, single-serving container of alcohol could have been held in the pouch. The court said that theory was "simply too remote."

The Court of Appeals distinguished Hinderman, stating, "[t]o begin, unlike the situation in Hinderman, in the case now before us the circuit court found that the bag at issue certainly was large enough to hold common alcohol containers, such as cans of beer, bottles of liquor, and Coffee does not dispute this." State v. Coffee, 2019 WI App 25, ¶9, 387 Wis. 2d 673, 929 N.W.2d 245. The Court of Appeals then said this:

> More significantly, however, in Hinderman we ultimately relied upon the wrong standard, as Coffee does in this appeal. We erroneously expressed in Hinderman that the standard was whether there was "a reasonable belief that evidence relating to the crime of OWI *would* be found" in the pouch. See id., ¶11 (emphasis added). In Gant, 556 U.S. at 343, however, the United States Supreme Court established that, in the vehicle context, a search incident to a lawful arrest is permissible "when it is 'reasonable to believe evidence relevant to the crime of arrest *might* be found'" in the vehicle. (Emphasis added; citation omitted). Our state supreme court has adopted this standard from Gant. See [State v.] Dearborn, [2010 WI 84,] ¶¶26-27, 29, 327 Wis. 2d 252, 786 N.W.2d 97. Coffee, 387 Wis. 2d 673, ¶9.

Coffee also cites to Gant, where the U.S. Supreme Court determined that the arresting offense (driving with a suspended license) did not supply a lawful basis for searching the vehicle because there was no reason for an officer to search the interior of the vehicle, other than purely for a fishing expedition. Coffee asserts that it follows that in a drunk driving case, the "offense of arrest" should be limited to "*alcohol-related* OWI."

He challenges the holding of the Court of Appeals decision, that an officer is entirely justified in searching a vehicle for evidence of any other potentially "impairing substance" based on the reasoning that Coffee was arrested for "operating under the influence of an intoxicant or other drug." Wis. Stat. § 346.63. Coffee argues that the Court of Appeals' holding amounts to a new blanket rule which, he contends, runs afoul of U.S. Supreme Court precedent. The issue whether an OWI arrest supplies a per se basis to search a car and any containers in it "is a highly charged" issue in courts around the country. See, e.g., People v. Kessler**,** 436 P.3d 550, ¶¶21-25 (Co. Ct. App. 2018).

The Supreme Court is expected to address the following issue:

> Did the totality of circumstances create a basis for a search of Mr. Coffee's vehicle, and of the contents of a backpack found on the backseat floor, after police arrested Mr. Coffee, cuffed him and placed him in the back of a squad car on suspicion of drunk driving?

**WISCONSIN SUPREME COURT**
**January 21, 2020**
**10:45 a.m.**

2018AP1165 Jose M. Correa v. Woodman's Food Market

*This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that reversed a decision of the Milwaukee County Circuit Court, Judge William Sosnay presiding, which upheld a jury verdict finding Woodman's liable for Correa's injuries; the Court of Appeals directed the circuit court to enter judgment for Woodman's.*

This case raises the question of what is sufficient evidence to send a constructive notice case to a jury. In November 2014, Jose Correa was in the dairy aisle at Woodman's when he slipped and fell, injuring himself. Correa notified a Woodman's employee, who promptly cleaned up two spots and gave Correa a paper towel to wipe a substance off his shoe. The incident was reported. Two store personnel watched the store security video showing the dairy aisle for some 90 minutes before the fall, but could not determine what happened.

In May 2016, Correa filed suit against Woodman's, arguing, as relevant here, a violation of Wisconsin's safe place statute. To be liable for a failure to correct a defect, the owner must have actual or constructive knowledge of the defect. Generally, an "owner is deemed to have constructive notice of a defect or unsafe condition when that defect or condition has existed a long enough time for a reasonably vigilant owner to discover and repair it." Megal v. Green Bay Area Visitor & Convention Bureau, Inc., 2004 WI 98, ¶12, 274 Wis. 2d 162, 682 N.W.2d 857. "The length of time viewed as sufficient varies according to the nature of the business, the nature of the defect, and the public policy involved." See Rosario v. Acuity & Oliver Adjustment Co., 2007 WI App 194, ¶12, 304 Wis. 2d 713, 738 N.W.2d 608 (quoting May v. Skelley Oil Co., 83 Wis. 2d 30, 36-37, 264 N.W.2d 574 (1978)).

It is not disputed that Correa slipped and fell on something. Woodman's argues that Correa failed to show that Woodman's had notice that there was a hazardous substance on the floor before he fell. The trial court allowed the case to go to trial, and a three-day jury trial was conducted. Correa testified, as did two Woodman's employees. The jurors also watched a ten-minute portion of the security video of the dairy aisle prior to, during, and after Correa's fall.

Woodman's moved for a directed verdict, arguing that Correa had not presented any evidence to show when the substance got on the floor. The trial court denied the motion and the jury returned a verdict against Woodman's, finding that its negligence was the sole cause of Correa's accident, awarding Correa damages.

Woodman's appealed, asserting that "constructive notice cannot be found when there is no evidence as to the length of time the condition existed." Id**.** Correa maintains the video provides some temporal evidence from which a jury reasonably infer that the substance was present at the start of the video.

The Court of Appeals reversed. It concluded that Correa failed to present sufficient evidence to show that Woodman's had constructive notice of a hazard before he fell, and directed the circuit court to dismiss his complaint. The Court of Appeals relied on Kochanski v. Speedway SuperAmerica, LLC, 2014 WI 72, ¶36, 356 Wis. 2d 1, 850 N.W.2d 160. In Kochanski**,** the plaintiff slipped and fell on a curb outside a Speedway convenience store on a February morning, following a light snowfall. At trial, Speedway presented surveillance video

footage showing the fall. The jury returned a verdict for the plaintiff. The Court of Appeals reversed and remanded for a new trial. This court affirmed, holding that the evidence was insufficient to establish constructive notice for the following reasons: (1) the video footage showing a light accumulation of snow did not establish that a dangerous condition existed when the accident occurred; (2) Kochanski offered no evidence to show how long the alleged unsafe condition existed; and (3) Kochanski presented no evidence that Speedway's safety policies and procedures were inadequate or not followed. This court stated that Kochanski had not shown actual notice or the length of time the defect existed, or that Speedway's methods and processes for handling unsafe conditions were not followed. The court reasoned, "Speculation as to how long the unsafe condition existed . . . [is] insufficient to establish constructive notice." Id., ¶36

Woodman's says this case is controlling and that there is "not a scintilla of competent evidence" regarding the timing of the spill giving rise to Correa's fall. Correa suggests that he did offer sufficient evidence to send this case to a jury. He argues that the Court of Appeals improperly expanded the holding of Kochanski, raising the requirements for constructive notice beyond what was intended by statute or by this court.

The court is expected to consider this issue, as presented by the plaintiff-respondent-petitioner:

> The Court of Appeals seeks to improperly expand the holding of this Court's decision in Kochanski v. Speedway SuperAmerica by preventing a jury from drawing reasonable inferences from the existing video surveillance evidence in a premises liability case. See generally, Kochanski v. Speedway SuperAmerica, LLC, 2014 WI 72, 356 Wis. 2d 1, 850 N.W.2d 160. (Discussing standards of proof in premises liability cases in detail and heavily relied upon by the Court of Appeals in this matter).
>
> Furthermore, the Court of Appeals improperly reweighed the evidence while attempting to comply with its improper understanding of Kochanski and this case presents an opportunity for the Wisconsin Supreme Court to reemphasize the specific role of appellate review.
>
> Lastly, the Supreme Court is encouraged, in addition to clarifying its position in Kochanski, to revisit Wisconsin jurisprudence with regard to constructive notice in premises liability cases given the proliferation of video surveillance evidence in the 21st century.

**WISCONSIN SUPREME COURT**
**January 21, 2020**
**1:30 p.m.**

2017AP774-CR State v. Courtney C. Brown

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a judgment entered in Fond du Lac County Circuit Court, Judge Richard J. Nuss presiding, convicting Courtney C. Brown of one count of possession with intent to deliver cocaine, as a repeater.*

Stated generally, this case examines whether a police officer improperly extended a noncriminal traffic stop involving Brown. The necessary background facts are as follows.

The officer observed Brown at 2:44 a.m. in Fond du Lac driving in a dead end cul-de-sac surrounded by closed businesses. The officer ran a records check and learned that the vehicle was a rental car. The officer followed the car, saw it fail to properly stop at a stop sign, and initiated a traffic stop.

The officer made contact with Brown. The officer saw that Brown was not wearing a seat belt. The officer asked Brown where he was coming from; Brown said he was coming directly from a particular gas station, which was inconsistent with the officer's observation that he had just come from a dead end cul-de-sac surrounded by closed businesses.

The officer returned to his squad car with Brown's driver's license to write a warning for the no-seat-belt violation. The officer ran a records check and learned that Brown had many drug arrests and had been convicted of possession with intent to distribute cocaine and armed robbery. The officer inquired as to whether a canine was available to conduct a dog sniff, but was told neither the city nor county had one on duty. The officer finished writing the warning ticket.

At this point, the officer believed that Brown was involved in drug-related activity. The officer returned to Brown's car, opened the door, and asked him to step out. Brown and the officer walked to the officer's squad car, and the officer asked Brown to place his hands behind his back. Although he had no specific safety concern, the officer asked for permission to search Brown. The parties dispute whether Brown gave consent: the officer testified that he did, and Brown testified that he didn't. The officer searched Brown and found crack cocaine on his person.

Brown offers the following issues for this court's review:

1. Did the officer have the requisite level of reasonable suspicion to extend the detention beyond issuing a seat belt citation?
2. Did the officer improperly extend the traffic stop?